IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY,
Claimant, Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The majority opinion in the Court of Appeals (R. 57-63) is reported at 87 F. 2d 1014; the dissenting opinion in the Court of Appeals (R. 64-67) is reported at 87 F. 2d 1014, 1018. The opinion of the District Court (R. 25-27) is reported at 87 F. Supp. 735.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on June 27, 1950 (R. 67). Thereafter, on July 15, 1950, and within the time allowed therefore, a petition for rehearing (R. 67-74) was filed which was denied on July 22, 1950 (R. 78). On July 17, 1950, the respondent, the United States of America, filed a "Suggestion for Modification of Opinion," (R. 74-77) which was denied on July 22, 1950 (R. 78). A petition for a writ of certiorari was filed on October 16, 1950, and was granted November 27, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether "imitation jam" labeled and marketed as an "imitation" food in conformity with the provisions of Section 403 (c) of the Federal Food, Drug and Cosmetic Act is subject to seizure as a misbranded food under Section 403(g) if said "imitation jam" fails to meet the definition and standard of identity for pure fruit jam.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, c. 675, 52 Stat. 1040, as amended June 24, 1948, c. 613, 62 Stat. 582, 21 U.S.C. 301, et seq. (hereinafter sometimes referred to as "the Act"), provides in pertinent part:

> Section 304 (21 U.S.C. 334). (a) Any article of food,***that is***misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce***shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found:***.
>
> Section 401 (21 U.S.C. 341). Whenever in the

judgment of the (Federal Security) Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulattions fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity,***.

Section 403 (21 U.S.C. 343). A food shall be deemed to be misbranded—

* * *

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, ***.

STATEMENT

For a period in excess of 15 years prior to the commencement of this libel action, the petitioner, Pure Food Manufacturing Company of Denver, Colorado, has manfactured "imitation jams" similar to the products herein seized, and prior to approximately 1935 had manufactured a "compound jam" of the same type and consistency as the "imitation jam" herein seized. At the request of the Denver Station of the Food and Drug Administration, the petitioner changed the label of the product from "compound jam" to "imitation jam", and since complying with such request, has continually manufactured and sold "imitation jam" in interstate commerce (R. 44-45).

A libel of information filed by the United States of America in the United States District Court for the Dis-

trict of New Mexico alleged that the food seized, namely, 62 cases, more or less, each containing six jars of jam, assorted flavors, net weight 5 lbs. 2 oz., was misbranded within the meaning of Section 403(g) when introduced and while in interstate commerce and while held for sale after shipment in interstate commerce, in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to Section 401 of the Act. The libel of information further alleged that the food seized failed to conform to such definitions and standards of identity (R. 3-6).

The definitions and standards of identity for Fruit Preserves, 21 C.F.R. 29.0, pp. 81-84 (1949 ed.), provided that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and the soluble solids content of blackberry, strawberry and grape jam be not less than 68% and the apricot, peach and plum jam not less than 65% (R. 4-5).

The petitioner in his answer (R. 12-14) freely admitted that the jams under seizure contained less than 45% fruit as required by the definitions and standards for pure fruit jam. The defense of the petitioner is that the products were properly labeled "imitation jam" and hence are sanctioned in interstate commerce under the specific authority of Section 403(c) (R. 13-14).

Further, petitioner denied that the "imitation jam" under seizure purported to be or was represented to be pure fruit jam for which definitions and standards of identity had been promulgated.

At a pre-trial conference before the Honorable Carl A. Hatch, United States District Judge for the District of New Mexico, which developed into a trial without witnesses, it appeared that there was no significant dispute as to the facts. It was agreed, and the Trial Court found (R. 22-23) that the composition of the foods under seizure

was approximately as indicated on the label, which contained the following:

Net Wt. 5 Lbs. 2 Oz.

Delicious Brand
Imitation
Strawberry Jam

(or Grape, Apricot, Plum, Peach, Blackberry Jam)
made from 55% sugar, 25% fruit
20% pectin, citric acid, 1/10 of 1%
benzoate of soda
Packed by
The Pure Food Mfg. Co.
Denver, Colo.

The Government offered to prove that in one hotel in New Mexico, a patron of the restaurant was served "imitation jam" when the menu read "Jellies or Preserves served with above orders", and that the patron had neither the opportunity to examine the label nor to know he was consuming an imitation product (R. 41-42)

The Government further offered to prove that in some instances grocers in answer to requests from their customers for "jam" would furnish "imitation jam" (R. 43). Similarly respondent offered to prove that at some logging camps and ranches "imitation jam and jellies" have been served to employees, and that such employees ate and consumed such products without being informed that the same were "imitation" products and without an opportunity to see or observe the label of the container (R. 43).

The petitioner offered to prove by its president (1) that the article seized had been manufactured under sanitary conditions; (2) that it was wholesome, and had food value; (3) that the labels correctly set forth the ingredients and the proportions of each in the food; (4) that the petitioner has made "imitation jams" for a period in excess of 15 years; (5) that prior to that time the petitioner had manufactured what was known as a "com-

pound jam," which was in effect the same type food with the same consistency as the product here involved, but that at the request of the Denver Station of the Pure Food and Drug Administration, had changed the label to designate the product as "imitation jam;" (6) that more than 50% of its "imitation jam" is sold through retail food store outlets with the label displayed plainly on the container; (7) that the price of these "imitation jams" is 50% lower than that of pure fruit jams; and (8) that some consumers have written to the petitioner stating that they prefer the "imitation jam" to pure fruit jam (R. 44-46). The petitioner stated that it would have witnesses who would testify that they purchase its product from retail stores, and that by the label and the price they know they are not getting real fruit jam (R. 45). The Government agreed that the petitioner could obtain witnesses who would testify as indicated (R. 46-47).

Pursuant to agreement, the testimony specified above, which had been detailed by counsel for the Government and the petitioner, was considered by the Trial Court as evidence in this case (R. 47-48). The Trial Court made extensive findings of fact and conclusions of law (R. 20-25), and rendered a written opinion (R. 25-27), which is reported at 87F. Supp. 735. This written opinion declared that the article of food seized was an imitation of another food and it did not pretend to be anything else, that the article of food met every requirement of Section 403(c) of the Act [21 U.S.C. 343-(c)], and that Section 403 (c) even when read in connection with Section 403 (g), prevents "imitation food" properly labeled from being misbranded. Among other findings of fact, the Court found:

> (1) That the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams, and do not purport and are not represented to so comply with such standards. (Finding of Fact 15, R. 23)
>
> (2) That the articles of food seized purport to

be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else. (Finding of Fact 16, R. 23)

(3) That the articles of food seized are sold in interstate commerce without deception. (Finding of Fact 17, R. 23)

Judgment dismissing the libel of information was entered on October 20, 1949 (R. 28). On appeal to the Court of Appeals for the Tenth Circuit, the majority of the Court (R. 57-63) reversed the lower court on the ground that the jams under seizure purported to be and were represented to be fruit jams for which a definition and standard of identity had been promulgated, that they did not conform to the definition and standard of identity, and were therefore misbranded (R. 62-63). The majority opinion concluded, however, that "the manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin" (R. 63).

The dissenting judge in his opinion (R. 64-67) would have affirmed the District Court on the ground that the food was labeled "imitation" in conformity with Section 403 (c), and to now seize the food as "misbranded" would render that section meaningless (R. 66). In addition, the dissenting judge stated that to sustain the Government's position, would mean to standardize price which was contrary to the intent of Congress.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that the seized articles of food were misbranded.

(2) In failing to give weight to the plain ordinary meaning of the word "imitation" on the labels of the seized articles.

(3) In failing to consider the intent of the Congress

of the United States to sanction "imitation" foods in interstate commerce.

(4) In disregarding the finding of the trial court that the articles of food seized purport to be and are represented as "imitation fruit preserves" and purport to be nothing else and are represented as nothing else.

(5) In failing to consider that for many years the official position of the Food and Drug Administration was that products similar to those seized in this case *must* be labeled and marketed as "imitation jam."

(6) In stating that the product seized could be marketed as "syrup and fruit thickened with pectin, or syrup flavored with fruit and thicked with pectin."

(7) In attempting to apply *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill & Libby vs. United States*, 148 F. 2d 71 (C. A. 2), and *United States v. 716 Cases, More or Less, etc., "Del Comida" Brand Tomatoes*, 179 F. 2d 174 (C. A. 10) to the instant case.

(8) In enforcing the seizure provisions, Section 304 of the Act, against food products which were not misbranded "while held for sale after shipment in interstate commerce."

(9) In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The article of food seized by the Government in this action, "imitation fruit jam" is an imitation food sanctioned under Section 403 (c) [21 U. S. C. 343 (c)]. Section 403 (c) of the Federal Food, Drug and Cosmetics Act is clear and unambiguous and reads as follows:

> "A food shall be deemed to be misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

The specific language of Section 403 (e) leaves no doubt that "imitation jam" is sanctioned in the channels of interstate commerce, but in addition, reports and comments of legislative committees, senators, representatives, and officials of the Food and Drug Administration during the period prior to the passage of the Federal Food, Drug and Cosmetic Act further demonstrate the approval of "imitation" food products in interstate commerce. Subsequent to the enactment of the Act, the Food and Drug Administration took as its official position that foods which do not comply with a definition and standard of identity must be labeled and marketed as "imitation" foods. The Food and Drug Administrator in his Trade Correspondence No. 151 issued March 7, 1940, stated that a manufacturer should produce an article conforming strictly to the standards for "Tomato Puree." "The only other alternative which in our opinion (The Food and Drug Administration) would insure a legal article (although not conforming to the standard) would be to label your present product '*Imitation* Tomato Puree'." (Italics ours) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628. Similarly in his Trade Correspondence No. 358 dated April 17, 1941, the Food and Drug Administrator recommended a food product be labeled "Imitation Strawberry Jam." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

In the light of the clear and unambiguous wording of Section 403 (e), the legislative history of the Act, and the interpretations of the Federal Food, Drug and Cosmetic Act by the Food and Drug Administration following the enactment of the Act in 1938, the attempted seizure by the Government must be dismissed, for if it is not dismissed, Section 403 (e) will be rendered meaningless.

If, however, this Honorable Court should render Section 403 (e) meaningless, nevertheless the Government has not maintained and cannot maintain its seizure under Section 403 (g). Section 403 (g) provides as follows:

> "A food shall be deemed to be misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by Section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *."

The Trial Court having heard all the facts offered in evidence by both the Government and the Claimant, made the following finding of fact:

> "That the articles of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of Fact 16, R. 23).

This finding of fact precludes the consideration by the Court of Section 403 (g) since the product under seizure does not purport to be nor is it represented to be jam for which a definition and standard of identity has been established.

The question before this Honorable Court is one of first impression. No court prior to the Trial Court in this action has been asked to interpret Section 403 (c) of the Federal Food, Drug and Cosmetic Act. The cases upon which the Government relies, *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, 81 Law Ed. 724, "*United States v. 306 cases . . . Sandford Tomato Catsup with Preservatives*, 55 F. Supp. 725 (E. D. N. Y.); *United States v. McGuire*, 64 F. 2d 485, (C. A. 2) cert. denied 290 U. S. 645; *United States vs. 2 bags Poppy Seeds*, 147 F. 2d 123 (C. A. 6); and *United States v. 30 Cases, more or less . . .* "*Leader Brand Strawberry Fruit Spread*," 93 F. Supp. 764, (S. D. Iowa, Central Division) are not in point as to the question presented to this Honorable Court. None of the above cases interpret the imitation section; none of them can be cited in support of the Government's position in this case. The Government in attempting to apply such cases to the seizure in this

action is attempting to expand the legal theories therein expounded far beyond the intent of the court, and to impose the dicta of these cases upon the "imitation" section of the Act, which section was not even mentioned in any of the four cases.

There is no contention by the Government that "imitation jam" is any less nutritious, any less wholesome, or has any less food value than pure fruit preserves. On the contrary, the record is singularly lacking in any reason how the public will be benefited by the proposed prohibition against "imitation" jam. If the Government should be successful in this abortive attempt, the public will be deprived of a wholesome food product having food value comparable to pure fruit jam but selling at approximately one-half the price of the standardized product. To afford maximum protection to the consuming public, the attempted seizure by the Government must be dismissed.

In addition, the Government has totally failed to lay a foundation for the seizure of the "imitation" jam as required by Section 304 (a) of the Act. Section 304 (a) provides that any article of food may be proceeded against if it is misbranded "when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce." There is not a single scrap of evidence introduced by the Government that the petitioner represented to the wholesaler, retailer, or ultimate purchaser that the "imitation" jam was the standardized jam. No invoices nor advertising material purported to represent the "imitation" as pure jam. Having failed to sustain the basis for seizure as required by Section 304 (a), the libel action of the Government must fail.

The Government has contended that the attempted seizure of "imitation jam" follows a consistent pattern of administration by the Food and Drug Administrator. An examination of the treatment of other food products

by the Administrator reveals a policy completely in contrast with the action attempted here. In bringing this action, the Government has refused to accept "imitation jam" as having a separate and distinct identity of its own. But the Government has sanctioned the manufacture and sale of sub-standard cream cheese by establishing standards for "neufchatel cheese," 21 *Code of Federal Regulations*, 19.520, CCH *Food, Drug and Cosmetic Law Reporter*, Section 2363. The only difference between cream cheese and "neufchatel cheese" is the increase in moisture and decrease in milk fat in the substandard food. Likewise, substandard cocoa coating has been recognized by the Government, and a definition and standard of identity for oleomargarine has long been in effect. Instead of a consistent policy, it is apparent that the Food and Drug Administrator has singled "imitation" jam for special prosecution and prohibition, contrary to the best interests of the consuming public.

ARGUMENT

I

THE FEDERAL FOOD, DRUG AND COSMETIC ACT IN UNMISTAKABLE LANGUAGE HAS SANCTIONED "IMITATION" JAM AND OTHER "IMITATION" FOOD PRODUCTS IN INTERSTATE COMMERCE.

The food product seized in this action is "imitation jam" as sanctioned in interstate commerce under Section 403 (c) of the Act. Section 403 (c) provides as follows:

> "A food shall be deemed misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation,' and immediately thereafter, the name of the food imitated."

The food seized contained a label bearing in type of uniform size and prominence the word "imitation" and

immediately thereafter the name of the food imitated, namely "jam." The Trial Court found as one of its Conclusions of Law that "the labels on the seized articles conform in all respects with the requirements of Section 343 (c)" [Section 403 (c)] (Conclusions of Law, 3, R. 24). At no point in the evidence is there any intimation whatsoever that the Government questions the conformity of the food seized with the provisions of the imitation section. In fact, the petitioner changed its label from "compound jam" to the present label at the request, with the approval, and under the supervision of the Denver Station of the Food and Drug Administration. Nowhere is there any suggestion that the label does not conform with Section 403 (c).

The label of the seized food conforms to the requirements of Section 403 (c), what then is the status of the "imitation jam" shipped and marketed in interstate commerce? The statute plainly and without qualification states that such "imitation jam" shall not be deemed misbranded. To accept the Government's position that in spite of the compliance with Section 403 (c), the "imitation jam" is misbranded if it fails to conform to the definition and standard of identity of pure fruit jam, would be to render the "imitation" section meaningless. The word "imitation" in itself means substandard. Webster's *International Dictionary* defines imitation when used as an adjective as "simulating something superior." As Judge Pickett states in his dissenting opinion in the Court of Appeals for the Tenth Circuit, "No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public that the labeled food was not a standard product" R. 66, 183 F. 2d 1014, 1020).

If the Congress, as the Government here contends, had intended to eliminate imitation food from the avenues of interstate commerce, it had clear and unambiguous language in the drug section of the Act to use as a guide. Section 502 (i) (2) [21 U.S.C. 352 (i) (2)] provides in part as follows:

"A drug or device shall be deemed to be misbranded . . . if it is an imitation of another drug."

The failure of the Congress to use such phraseology in Section 403, and the clear and commonly understood meaning of Section 403 (c) as enacted by the Congress leaves the inescapable conclusion that the food seized is an "imitation food" sanctioned in interstate commerce.

II

THE LEGISLATIVE HISTORY OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT SUPPORTS THE PLAIN MEANING OF THE LANGUAGE OF SECTION 403 (c) AND DEMONSTRATES THE INTENT OF THE CONGRESS TO SANCTION "IMITATION JAMS" EVEN THOUGH DEFINITIONS AND STANDARDS OF IDENTITY HAVE BEEN PROMULGATED FOR PURE FRUIT JAM.

The language of Section 403 (c) is clear and free from ambiguity. It sanctions "imitation jam" in interstate commerce. The language of such section offers no qualification to such a result. The legislative history of the Act, and its interpretation by the Food and Drug Administration firmly support this position.

Parties to this action were most fortunate in having this case heard before the Honorable Carl A. Hatch, U. S. District Judge, for the District of New Mexico, since Judge Hatch, as a United States Senator from the State of New Mexico, was present in the Congress of the United States during the time of the extended debates and prior to the passage of the Federal Food and Drug Act of 1938. Judge Hatch, as a member of Congress during these times, was most familiar with the intent and purpose of the Act, and his opinion in the lower court carried out such intent by refusing to allow the Government to prevail in its interpretation of the Act which far transcended any intent in the minds of the members of Congress at the time of the passage of the Act.

To understand the intent of Congress in enacting Section 403 (c), it is necessary to go into the background of the passage of the 1938 Act. Although many failings of the Food and Drug Act of 1906 became apparent during the stress of an economic depression in 1932 and the following years, no decision was as strongly stressed by the Food and Drug Administration to show the need for revision of the 1906 Act as the so-called "*Bred Spred*" case. In *United States v. Ten Cases, more or less, "Bred Spred,"* 49 F. 2d 87 (C. A. 8), the Government seized a product sold in interstate commerce under the name "Bred Spred."

"Bred Spred" had the appearance of preserves, but it contained less than one-half the amount of fruit required by the trade standard recognized for such products. The price of "Bred Spred" was only slightly less than that of the product sold under the label of pure preserves.

Defense of the product rested on Section 8 of the Food and Drug Act of 1906, 21 U. S. C., 10, which provided in part as follows:

> "*Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> "First. In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

The court held that "Bred Spred" since it did not contain any "poisonous" or "deleterious" ingredients was not misbranded because of the distinctive name provision of the statute above quoted.

Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, in an appearance before a subcommittee of the Senate Committee on Commerce on December 7, 1933, stated as follows:

> "The Bill S. 1944 (which with amendments not pertinent to this argument became the Food, Drug and Cosmetic Act of 1938) as framed eliminates that objectionable provision of the Act which makes it possible, by the employment of some fanciful designation like the term 'Bred Spred' to market a product under the legal assurance that it will be subject to none of the prohibitions of the Act as applied to all types of foods and drugs, with the single exception that it must contain no added poisonous ingredients." Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1052.

It is important at this point to note that although as a result of the "Bred Spred" case, the distinctive name provision of the 1906 Act was eliminated, the imitation exception contained in 21 U. S. C. 10 was carried over to the 1938 Act as Section 403 (*e*).

Mr. Walter G. Campbell, appearing before a subcommittee of the House Committee on Interstate and Foregin Commerce considering Senate Bill 5 of the 74th Congress held the following discussion with members of that committee:

> "Mr. Campbell. If there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consisteney make preserves. That has been the

common-law standard or the trade custom on the part of manufacturers throughout time.

"But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. * * * But that product is not labeled as a preserve. It is labeled as "Bred Spred." But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for. * * *

"There is fruit, sugar, and a pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted. * * *

"Mr. Chapman: What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell: Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

"Mr. Chapman: That would be shown on the label?

"Mr. Chapman: It would have to be shown on the label just what it was, and enable the *consumer to buy it* for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. *There can be no objection to that article with its deficiency of fruit*

if every consumer knows exactly what he is buying. (Italics ours)

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1239.

It was pursuant to this philosophy of the 1938 Act as above expressed by Mr. Campbell that the imitation section of the 1906 Act was retained as Section 403 (c) of the 1938 Act. If the consumer knew what he was buying, i. e. the label bearing the word "imitation," there can be no objection to an article with a deficiency in fruit.

The Government has contended and has devoted much of its brief in the Court of Appeals to the proposition that Section 403 (g) must be read independently of Section 403 (c) of the 1938 Act, and that once standards of identity have been promulgated, Section 403 (c) has no further meaning or legal effect. Such a construction of the two subsections is completely foreign to the construction placed upon these two subsections by Congressional leaders at the time of the passage of the 1938 Act.

The Federal Food, Drug and Cosmetic Act of 1938 is commonly referred to as the Copeland Bill in honor of United States Senator Royal S. Copeland of the State of New York. Senator Copeland struck at the heart of this libel proceeding before this court when he said:

"It should be noted that the operation of this provision [Section 403 (g)] will in no way interfere with the marketing of any food which is wholesome but *which does not meet the definition and standard*, or for which no definition and standard has been provided, but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation." (Italics ours) Dunn, *Federal Food, Drug and Cosmetic Act*, page 246.

By eliminating the distinctive name provision of the 1906 Act but retaining the imitation provision in Section

403 (c), Congress has provided for the manufacture and marketing in interstate commerce of "imitation jam," which although it does not meet the definition and standard of pure fruit jam, is wholesome and has great food value. To sustain the Court of Appeals in this action would only mean that by judicial action the Food and Drug Administration has obtained an amendment to the 1938 Act contrary to the intent of Congress.

As has been pointed out earlier in this brief, the petitioner, Pure Food Manufacturing Company, appears before this court with clean hands, its good faith, integrity, and honesty unchallenged by the Government. The Congress in passing the 1938 Act had no intention of disturbing an honest industrial enterprise such as the petitioner herein. Its purpose was "to provide a measure which will be an effective control for existing abuses (i. e. the "Bred Spred" case), and *at the same time, impose no limitation, embarrassment or hardship on honest industrial enterprise.*" (Italics supplied). Mr. Virgil Chapman, Congressman from Kentucky speaking before the House of Representatives, June 19, 1936. Dunn, *Federal Food, Drug and Cosmetic Act*, page 576.

It is submitted that Congress intended in no way to harass nor hinder an honest business enterprise such as the petitioner herein in the manufacture of "imitation jam" so long as the articles were labeled in accordance with Section 403 (c).

Up until 1945, the Federal Food and Drug Administrator had agreed with and followed the clear intention of Congress as evidenced by his Trade Correspondence No. 151 issued March 7, 1940, which is set forth in part as follows:

> "Correspondent raises question with respect to the status of so-called 'Strained Tomatoes Slightly Condensed.'
>
> "* * * we understand that you * * * desire to continue to pack this product which consists of whole

strained tomatoes very slightly concentrated but not brought to the degree of concentration of 'Tomato Puree.' In our opinion, such a product resembles 'Tomato Puree,' and by reason of this resemblance the product purports to be 'Tomato Puree.' The definitions and standards of identity so far promulgated for tomato products recognize an unconcentrated comminuted tomato product under the name of 'Tomato Juice' and recognize comminuted tomato products in differing degrees of concentration under the names 'Tomato Puree' and 'Tomato Paste,' respectively. There is no recognition of an article intermediate between an unconcentrated tomato product and 'Tomato Puree.' Consequently, it is our opinion that the slightly concentrated article you have in mind may have no legal status except as provided for under Section 403 (e) of the Food, Drug and Cosmetic Act, the provision dealing with imitations. We suggest, therefore, that in the manufacturing process you continue the concentration to at least 8.37 per cent salt-free tomato solids, producing an article conforming to the standards for 'Tomato Puree' which can be labeled as such. The only other alternative which in our opinion would insure a legal article would be to label your present product '*Imitation* Tomato Puree'." (Italics supplied) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628.

Similarly the Food and Drug Administrator states in his Trade Correspondence No. 358 issued April 17, 1941, that a mixture of strawberries, apple juice and sugar, although substandard "will simulate the appearance and flavor of a strawberry jam and in our opinion, should be labeled as an imitation jam under Section 403 (e) of the Act." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

The language of Section 403 (e) is clear; the intent of Congress amply supports the plain ordinary meaning of this language; and the interpretation of this section,

even when read in conjunction with Section 403 (g), by the Food and Drug Administration, leaves but one conclusion: Section 403 (g) was not inserted in the 1938 Act to prohibit the manufacture and sale of substandard foods as long as they were properly labeled as "imitation" in conformity with Section 403 (c).

To the argument of the Government that the Trade Correspondence above sets forth represents day to day informal opinions to the trade, the attention of the Court is called to the official position of the Federal Security Administrator in *Land O'Lakes Creameries, Inc., et al v. McNutt, Federal Security Administrator*, 132 F. 2d 653 (C. A. 8). In that case, the Creamery Company challenged the definition and standard of identity for oleomargarine promulgated by the Federal Security Administrator. Among arguments advanced by the Creamery was the proposition that it was the duty of the Federal Security Administrator to require manufacturers of oleomargarine to label their product "imitation butter." The Federal Security Administrator in answering this argument again recognizes and expounds the Congressional intent that the word "imitation" prevents a substandard food product being passed off as the genuine or standard product. The Court in setting forth the Administrator's answer stated as follows:

> "The answer of the respondent (Government) is that oleomargine containing the optional ingredients referred to in the order, is not 'an imitation' of butter within the meaning of Section 403 (c); that the mere resemblance or similarity of one food to another is insufficient to make one an 'imitation' of the other; *and that what Section 403 (c) is directed at is preventing a spurious food being passed off as genuine. The* respondent also contends that, even if some oleomargarine conforming to the standard of identity might be sold under circumstances which might possibly make it an 'imitation' of butter under Section 403 (c), that fact would not vitiate the standard, *since the provisions of Section 401, relating to the establish-*

ment of standards of identity, and the provisions of Section 403 (c) requiring that imitations of foods be labeled as such, are not conflicting and are independent of each other.' Land O'Lakes Creameries, Inc., et al. v. McNutt, Federal Security Administrator, 132 F. (2d) 653, 658.

The Government states that if Congress so desired to limit the scope of Section 403 (g) to a consideration of the labeling, the words were at its command. We agree with the Government that words were at the command of Congress to so limit its scope and they are found in Section 403 (c) The meaning of 403 (c) is obvious; namely, that Congress intended to and did permit the manufacture and sale in interstate commerce of articles of food imitating standard products when labeled in accordance with law because such imitation products are acceptable when sold at lower prices than standardized products. Some customers through necessity, others through thrift; voluntarily choose to buy and use the cheaper product, the substitute, the imitation; such is a God-given right that ought not to be curtailed by legislative fiat. Thus by the simple words contained in Section 403 (c), which are understandable in any language, Congress gave that right to the consuming public. As stated by Mr. Campbell, there is no objection to the sale of skim milk if the buyer knows that it is skim milk when he is buying it.

We contend here that the 1938 Act is clear and unambiguous in sanctioning the manufacture and sale of "imitation jam" in interstate commerce. But if the 1938 Act is considered ambiguous, then this Honorable Court must consider the various committee reports and debates incident to the passage of the 1938 Act in Congress. *McLean v. United States*, 226 U. S. 374, 57 L. Ed. 260. In addition, the statements of Senator Copeland as the Senator charged with the responsibility for the passage of the Act in the United States Senate must be given great weight by this Court in interpreting Section 403 of the 1938 Act, *Wright v. Vinton Branch of Mountain Trust*

Bank of Roanoke, 300 U. S. 440, 81 L. Ed. 736. Likewise, this Court may consider the 1906 Act and the conditions existing in the 1930's which were urged by the Federal Food and Drug Administrators as reasons for the revision of the 1906 Law. *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219, *in re McKenzie*, 142 F. 383. The Appellate Court cannot look independently at Section 403 (g) to determine the meaning of Section 403 (c). The Court must consider Section 403 (c) and (g) together in light of the 1906 law, the existing abuses of the 1906 law, the intent of Congress as exemplified by its debates, committee reports, statements by Senator Copeland and Congressman Chapman, and the plain ordinary meaning of the words and phrases used.

If there is any doubt in the court's mind that the plain language in Section 403 (c) does not sanction the manufacture and sale of "imitation jams," consideration of the construction factors set forth above will resolve any doubt.

Congress did intend, and by clear and unequivocal language so stated, that "imitation jams" such as the product seized in this action, are permitted and sanctioned in interstate commerce under Section 403 (c) of the Federal Food, Drug and Cosmetic Act of 1938.

III

THE TRIAL COURT FOUND AS A FINDING OF FACT THAT THE ARTICLES UNDER SEIZURE DID NOT PURPORT TO BE NOR WERE THEY REPRESENTED TO BE PURE FRUIT JAM FOR WHICH STANDARDS OF IDENTITY HAD BEEN ESTABLISHED UNDER SECTION 401 OF THE ACT.

Petitioner has no quarrel with the Government relative to the meaning of the word "purport" as used in Section 403 (g) of the 1938 Act. It should be given its usual and ordinary meaning, namely: "to convey, imply

or profess outwardly, as one's (especially a thing's) meaning, intention, or true character; to have the appearance, often serious appearance of being, intending, claiming, etc. (that which is implied or inferred)." Webster's *New International Dictionary, Second Edition.*

The trial court considered the articles seized in light of the definition above set forth. The Court first looked at the label which contained the word "imitation" in type of uniform size and prominence and immediately thereafter, the name of the food imitated, i. e. jam. Certainly the words "imitation jam" did not "convey, imply, or profess outwardly" that the article was jam. The seized article does not purport to be a standardized article; it is not sold, represented to be, nor purported to be an article of food for which a definition and standard of identity has been established. On the contrary the words "imitation jam" were red flags denoting to the consuming public that it was a product other than pure fruit jam. Webster's *International Dictionary* defines imitation when used as an adjective as "simulating something superior." Here the words "imitation jam" prominently displayed on the label in good faith told the consuming public that this article was not pure fruit jam; it did not purport to be, nor was it represented to be pure fruit jam.

The Court then considered the price for which the seized article was sold to the consuming public. The trial judge made a finding of fact that the imitation jams were substantially lower priced than fruit jams manufactured in accordance with the definition and standard of identity (Finding of Fact 13, R. 23). In this day and time, the consuming public, i.e., the American housewife, is acutely price conscious. A product would not appear to the housewife to be genuine fruit jam nor would it purport to be pure fruit jam when, in addition to the word "imitation" prominently displayed on the label, the article costs only half as much as pure fruit preserve. No housewife could be so misled.

The trial court then considered and made a finding

of fact that the majority of 5 lb. 2 ounce containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes (Finding of Fact 14, R. 23). The Court, however, recognized in certain isolated instances that logging camps, restaurants, and other service institutions might serve imitation jam without disclosing the label (Findings of Facts 18 and 19, R. 23, 24).

The record in this case does not disclose any evidence that the claimant shipped and billed the seized food as pure fruit jam. The "imitation jam," so the trial court found, was sold in interstate commerce "without deception" (Finding of Fact 17, R 23). This honesty and fair dealing on the part of the claimant continued throughout the manufacture and sale of the "imitation jam" in interstate commerce. The Government was unable to offer any evidence whatsoever to show that the claimant by any act or omission represented that the imitation jam seized was the standardized pure fruit preserves.

At the conclusion of the trial, the court asked both sides to submit proposed findings of facts and conclusions of law. The Government in response to this request submitted, among others, the following proposed findings of fact and conclusions of law:

> "That the article of food involved in this case, and labeled in part 'imitation jam', was so presented and represented to many consumers that to them it purported to be the food 'jam', for which definitions and standards of identity have been duly promulgated.
>
> "That where consumers are supplied with a food that has the appearance and taste of, and is eaten for, a food for which there is a legal standard of identity, and such consumers have no opportunity to observe the label of the food consumed by them, such food purports to be to them the standardized food regardless of any declaration contained on the label as to the identity of the food consumed.
>
> "That a food purports to be a food for which

definitions and standards of identity have been established, where such food simulates the color, taste, and appearance of, and is used in place of and in substitution for, such standardized food." (R. 18-19)

The trial court, however, having carefully considered the evidence stipulated by the parties and offered into evidence, weighed the evidence carefully, rejected the proposed findings of fact set forth above, and made the following finding of fact:

> "That the articles of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of fact 16, R. 23)

The trial court having carefully considered the evidence adduced and made a finding of fact that the articles seized do not purport to be nor are they represented to be pure fruit jam for which a definition and standard of identity has been established, such findings of fact is conclusive and binding on appeal. As this Honorable Court has said on numerous occasions:

> "It (the Trial Court) was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict . . . even if there was some basis for thinking the weight of the evidence was with the defendant as was strongly urged at our bar, it was not within the province of that court (Circuit Court of Appeals) to re-examine the evidence and reverse the judgment because of what it regarded as error of fact." *United States v. Jefferson Electric Manfacturing Company*, 291 U. S. 386, 407, 78 L. Ed. 859, 874. To the same effect, *United States v. Wells*, 283 U. S. 102, 120, 75 L. Ed. 867, 877.

Unless this Honorable Court shall see fit to reverse the finding of fact of the trial court and overthrow its long standing doctrine that findings of the trial court are conclusive in the reviewing court, Section 403 (g) has

no application in this case. The article of food seized is not represented to be and does not purport to be pure fruit jam, and therefore cannot be deemed to be misbranded under Section 343 (g).

IV

THE QUESTION PROPOUNDED BY THIS LIBEL PROCEEDING IS ONE OF FIRST IMPRESSION.

The Government throughout the trial and appeal of this action has contended that its position, here, namely, that at such time as a definition and standard of identity has been established, the imitation section, Section 403 (c) has no further force and effect and is therefore meaningless, is supported by binding legal precedences. Contrary to this contention by the Government, *No* court prior to the filing of the libel of information in this action has ever been asked to interpret the imitation provision of the 1938 Act.

The Government has cited in support of its contention the following cases:

Federal Security Administrator v. Quaker Oats Company, 318 U. S. 218, 87 L. Ed. 724;

United States v. 306 cases . . . Sandford Tomato Catsup with Preservatives, 55 F. Supp. 725 (E. D., N. Y.);

United States v. McGuire, 64 F. 2d 485 (C. A. 2), Cert. denied 290 U. S. 645;

United States v. 2 bags Poppy Seeds, 147 F. 2d 123 (C. A. 6);

United States v. 30 Cases, More or Less, Legder Brand Strawberry Fruit Spread, etc., 93 F. Supp. 764 (S. D. Iowa, Central Branch).

None of the cases cited by the Government in support of its position decides the issue in question here.

In *Federal Security Administrator v. Quaker Oats*

Company, supra, the articles seized were "Quaker Farina Wheat Cereal Enriched with Vitamin D" or "Quaker Farina Enriched by the Sunshine Vitamin." The Food and Drug Administrator had established standards for both "Farina" and "Enriched Farina." "Quaker Farina Wheat Cereal Enriched with Vitamin D" failed to conform to the standard for "Farina" by reason of its content of Vitamin D, which was not named by the standard, either as a required or an optional ingredient. The product did not conform to the standard for "Enriched Farina" since it did not contain the required Vitamin B, riboflavin, niacin, and iron.

The Quaker Oats Company argued that the standards of identity were unreasonable, and the Court of Appeals so held, but this Court on a writ of certiorari stated that it could not substitute its judgment for that of the administrator. This Court then went on to hold that since the products seized did not strictly conform to the standards of identity of either Farine or Enriched Farina, even though the labeling was truthful, the articles were misbranded. Nowhere in the *Quaker Oats* case is the question of "imitation" raised or discussed, the articles were not labeled "imitation" and whether or not if these foods had been labeled "imitation" the court would have reached the same conclusion is left unanswered. This Honorable Court did say, however:

"As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give consumers who purchase it under *that name* assurance that they will get what they may reasonably expect to receive." (Italics supplied) 318 U. S. 218, 232.

The language above quoted clearly demonstrates that this Court did not decide nor did it intend to foreclose the marketing of imitation foods under the authority of Section 403 (c).

In the second case cited by the Government, *United States v. * * * Sandford Tomato Catsup with Preservative, supra*, there seems to be no question that the article sold purported to be and was represented as tomato catsup. The manufacturer had added a preservative, which was not included in the standard promulgated by the administrator. It was not labeled imitation, but rather "tomato catsup with preservative added." The Court had no occasion to discuss Section 403 (c). The article under seizure, however, was in every particular the same as the standardized article, except for the fact that it contained a preservative not contained in the definition and standard of identity for tomato catsup, and consequently the Court held that it purported to be and was represented as tomato catsup, and since it did not comply with the standards of identity, it was misbranded. *United States v. 306 Cases * * * Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725, 726, 727. This case was appealed by the claimant, Libby, McNeill & Libby, to the Circuit Court of Appeals, Second District, *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C. A. 2) and affirmed. The Court of Appeals adds nothing to the opinion of the District Court insofar as the instant case is concerned. In both opinions, *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218 was taken as controlling. The question of imitation products is not discussed in either case.

In the third case, *United States v. McGuire, supra*, concerning the question of whether or not a certain ticket was a lottery ticket, other than defining the word "purporting," with which definition we do not disagree, that case is not in point in the instant case.

In the fourth case, *United States v. 2 bags * * * Poppy Seeds, supra*, the article that was seized was libeled upon the averment that the poppy seeds were adulterated. The facts therein are that white poppy seeds were artificially colored to resemble more costly seeds, because colored poppy seeds, although not possessing any greater food value than the white poppy seeds, were more costly. The

court found this action to be a deception of the consuming public. Section 403 (c) was not at issue in that case, and therefore, that case has no application in the instant case.

The latest litigation of the Government in the food and drug field in direct line with *Federal Security Administrator v. Quaker Oats Company, supra*, is *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc.*, 93 F. Supp. 764 (S. D. Iowa, Central Division). In this case the Government seized two pound jars of "Leader Brand Strawberry Fruit Spread." The evidence showed that the claimant therein had at times invoiced these articles as "Leader Brand Strawberry Pres." that at least one wholesale grocer invoiced the food seized as preserves, and that as late as March 20, 1950, certain "sales dodgers" distributed to the retail trade by at least one wholesale grocer to the Leader Brand products as "fruit jam spread". In view of this evidence, the court concluded "that the showing made does establish by a preponderance of the evidence that there was a substantial amount of actual representation of the seized items to be jams and preserves." 93 F. Supp. 764, 76.

The court having found that the food product seized was represented to be pure fruit jam, and the claimant having admitted in its answer that the articles did not conform to the definitions and standards of identity for pure fruit jam, the court found the articles seized were misbranded within the meaning of Section 403 (g) of the Act.

In addition, the court found that while both standard jams and "Leader Brand" products contain 32 per cent water, no water is introduced from the tap in the manufacture of standard jam; in the manufacture of Leader Brand Products 22.8 per cent of the water remaining in the products comes from the tap. The court found that the addition of tap water and solids of sugar derived from corn syrup and sugars increased the bulk and weight of the Leader Brand Products and made these articles appear

to the ordinary consumer to be better and of greater value than they are. The court concluded that the articles of food were adulterated within the meaning of Section 402 (b) (4).

United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, 93 Supp. 764, is but a continuation of the legal doctrine set forth in *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, and *Libby, McNeill, and Libby v. United States*, 148 F. 2d 71. All three of these cases are authority for the proposition that once definitions and standards of identity have been promulgated, articles of food which purport to be or are represented to be a standardized food must strictly conform to these definitions and standards. A deviation from such standard, no matter how slight the variation may be and even though the variation is disclosed by truthful labeling, the food shall be deemed to be misbranded under Section 403 (g).

Petitioner has no quarrel with the principles of law expounded in the three cases mentioned in the above paragraph. Not only are the decisions based on the plain meaning of the Federal Food, Drug and Cosmetic Act, but also they are in accord with the intent of Congress as universally expressed in the Committee reports and debates in Congress prior to the passage of the Act.

Petitioner contends that the three cases are no authority for and have no application to the question presented in the instant case. In each of the three cases, the food was represented by claimants and wholesalers alike as standardized food. In *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc., supra*, deception on the public was practiced by the manufacturer, i. e., tap water, supar and corn syrup were added thereto and packed so as to increase their bulk and weight and make them appear better and of greater value than they were.

In the seizure before this Court there was no repre-

sentation that the "imitation jam" was the standardized article; the "imitation jam" did not purport to be pure fruit jam (Finding of Fact 16, R. 23). In this action the Court also found that "the articles of food seized are sold in interstate commerce *without deception.*" (Italics supplied) (Finding of Fact 17, R. 23). The sole question before this Court for determination is whether or not the "imitation" provision of the Act means what it says, namely, that imitation food products may be marketed in interstate commerce if such food products are marketed in accordance with the provisions of Section 403 (c), or whether, contrary to the plain meaning of the Act, the intent of Congress clearly and unmistakingly expressed, and the administrative interpretations of the "imitation" section by the Food and Drug Administration, the interstate shipment of "imitation" food products will be prohibited. It is submitted that *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill and Libby v. United States*, 148 F. 2d 71 and *United States v. 30 Cases, More Or Less, Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764, are not authority for such a prohibition.

Prior to the decision in *Federal Security Administrator v. Quaker Oats Company, supra*, the official interpretation of the "imitation" section of the Act was clear and in conformity with the intent of Congress which was at that time fresh in the mind of the Federal Food and Drug Administrator. In two directives, the Food and Drug Administrator approved the theories advanced by petitioner in this case, and upon which the petitioner, and hundreds of other manufacturers of "imitation jam" relied in developing and marketing their products. In his Trade Correspondence No. 151 issued March 7, 1940, the Food and Drug Administrator stated that if a product did not conform strictly to the definition and standard of identity of tomato puree, "the only other alternative which in our opinion (the Government) would insure a legal article (although not conforming to the standard) would be to label

your present product '*Imitation Tomato Puree*'." (Italics supplied) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628.

Similarly on April 17, 1941, the Food and Drug Administrator, stated in his Trade Correspondence No. 358, a mixture of strawberries, apple juice and sugar although substandard "will simulate the appearance and flavor of a strawberry jam, and in our opinion, should be labeled as an imitation jam under Section 403 (c) of the Act." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

With the advent of the *Quaker Oats* decision, the Food and Drug Administrator abruptly reversed his position as to "imitation" foods. Immediately the Administrator took the position that the *Quaker Oats* case prohibited the interstate shipment of "imitation" food. Such a reversal of position on the basis of the *Quaker Oats* case was not justified under the facts, the decision, or even the dictum of the *Quaker Oats* case. On April 14, 1945, while in effect reversing his rulings in Trade Correspondence Nos. 151 and 358, the Food and Drug Administrator stated as follows:

> "NOTICE TO IMPORTERS OF PINEAPPLE PRODUCTS
>
> Pineapple and sugar mixtures purporting to be pineapple preserves, but not complying with the standard, are illegal under any form of labeling, even if labeled as imitation pineapple preserve, and will be denied entry into country.
>
> TC—427—April 14, 1945
>
> "In 1943 a number of importers of pineapple products were advised that various pineapple and sugar mixtures purporting to be pineapple preserves, but which contained somewhat less soluble solids than the 68 per cent required by the standard of identity

for pineapple preserves promulgated under the Food, Drug and Cosmetic Act should either be made to conform to that standard by increasing the concentration of soluble solids or should be labeled as imitation pineapple preserve.

"Further consideration of the matter in the light of recent court decisions has led us to conclude that products of this type are illegal under any form of labeling. It is not difficult to manufacture pineapple and sugar mixtures so as to contain not less than 68 per cent soluble solids and to otherwise conform to the standard for pineapple preserve in every particular.

"On and after May 15, 1945, shipments of such illegal articles will be denied entry. Previously issued administrative opinions which are not in accord with this notice are hereby rescinded." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 746.

Although the Food and Drug Administrator has abruptly reversed his field in prohibiting the interstate shipping and marketing of "imitation" food products, such reversal was based on an erroneous interpretation of *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, which as has been pointed out previously, was not concerned in any manner with Section 403 (c), the imitation provision of the Act.

Therefore, this Honorable Court must consider the question presented to it by this case, as a question of first impression to be decided on the basis of (1) the plain meaning of Section 403 (c) and (2) the Congressional intent as revealed in the Committee hearing and reports and in the debates on the Act in Congress.

The cases upon which the Government is relying to sustain its position are not in point with the instant case, and this Honorable Court, in reversing the Court of Appeals for the Tenth Circuit, will prevent the opinion in the *Quaker Oats* case from being strained by administrative interpretation far, far beyond the intent of this Court.

V

THE DECISION OF THE TRIAL COURT DOES EFFECTUATE MAXIMUM PROTECTION FOR THE CONSUMING PUBLIC.

The Government has ignored the welfare and protection of the consuming public in attempting to prohibit the interstate shipment and marketing of "imitation" jam. The Government is in effect trying to drive off the market a product competitive to pure fruit preserves. The Government has not contended that "imitation jam" is not wholesome, does not have food value, and is not nutritious. The Government did not even introduce evidence to indicate that "imitation jam" had any less food value, was any less nutritious, or any less wholesome than pure fruit preserves.

The Government merely introduced evidence that at a certain hotel in New Mexico, a patron of the restaurant was served "imitation jam" when the menu read "Jellies or Preserves served with above orders," and that the patron neither had the opportunity to examine the label nor to know he was consuming an imitation product. Further, the Government offered to prove that imitation jellies and preserves have been served at some ranches and logging camps to employees thereof and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label of the container.

Nowhere did the Government prove or offer to introduce evidence that as a result of the above transactions, the patron of the restaurant, or the ranch or logging camp employees were deceived or that their health and pocketbooks were not adequately protected. The record does not show one complaint as a result of such service and consumption of "imitation jam." The record is completely silent as to the way in which the consuming public would, could, or should be protected by the seizure of the "imitation jam" in this action.

The "imitation jam" industry of the United States is in the same relation to the pure fruit jam industry as the oleomargarine producer is to the butter manufacturer. If the Government had been able to show a real hardship to the consuming public as a result of the sale of "imitation jam," perhaps the Food and Drug Administrator could ask the Congress to pass a law that "imitation jam" be packed in triangular jars or that restaurants, ranches, and logging camps be required to publicly display signs that they are serving "imitation jam." In the meantime the consuming public has not complained since they are buying a product with comparable food value at one-half the cost.

The Government has also advanced an argument that to petitioner seems to display a naive approach to the manufacture and marketing of food products. In attempting to dramatize the catastrophes that might befall the consuming public if the decision of the court was not reversed, the Government states at page 17 of its brief in the Court of Appeals:

> "If the Section [Section 403 (g)] can be circumvented by the *simple* device of using the word 'imitation' on the label of a product . . . there has been an effective extraction of the section's teeth." (Italics ours)

How completely unrealistic are those words "simple device." In this day and time when advertising emphasizes the highest standard of purity and quality of ingredients, is a manufacturer going to attach the word "imitation" to his product and market it at a substantially lower price? Certainly not, at least not without a great deal of consideration of the connotations of the word "imitation" in any food product. It cannot be reasonably expected that an opinion of this Court will bring on a wave of "imitation" products injuring the public in some strange manner that the Government in this case failed to prove or even mention.

In commenting on the grave need for protecting the public, the Government throughout this entire condemnation proceeding, has overlooked and ignored a most important part of public policy. The purpose of the Federal Food, Drug and Cosmetic Act is "to provide a measure which will be an effective control for existing abuses, and at the same time, impose no limitation, embarrassment, or hardship on honest industrial enterprise." Dunn, *Federal Food, Drug and Cosmetic Act*, page 576. The petitioner in this action is honestly and in complete good faith manufacturing and selling in interstate commerce a wholesome food product sanctioned by directives of the Food and Drug Administrator himself. Trade Correspondence No. 151 issued March 7, 1950, and Trade Correspondence No. 358 issued April 17, 1941. Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627, 628, 712.

It is a fundamental principle of our form of government, completely ignored by the Government in this action, that all laws must be reasonably interpreted so that those who come under their jurisdiction may know the mandates of Congress. The trial judge in this case, who was at the time of the passage of this act a distinguished member of the United States Senate and who displayed a complete and clear knowledge of the Congressional intent of this act, did not ignore this fundamental principle of public policy. We can do no better than to quote from his clear and concise opinion as follows:

> "Any person reading sub-section *e* [403 (e)] and even in connection with sub-section g [403 (g)] would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word 'imitation' and immediately thereafter the name of the food imitated, such food so labeled would not be misbranded. Acting under such apparent, reasonable interpretation of the language of sub-section (e), the manufacturer has made and sold this article for years without any intent to violate the law. Claimant has sought to comply fully

with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.

"If the law-making branch of Government desires this particular statute to be given the construction for which the Government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate language indicating the legislative intention to make it impossible to imitation an article of food for which definitions and standards have been established, appears in sub-section (c).

"If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seeks to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction." 87 F. Supp. 735-737. (R.-26-27)

Similarly the dissenting Judge in the Court of Appeals expressed the same legal theory in these words:

"It is clear to me that the very purpose of Section 343 (c) [Section 403 (c)] is to permit on the market a wholesome and nutritious food which is within the means of a great mass of our people who are unable to purchase the standard products. At the time the bill was being considered by Congress, the Food and Drug Administration so recognized the necessity for such products. Senator Copeland who

sponsored the bill recognized the right to sell substandard foods, said, 'It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard has been provided.' Dunn, *Federal Food, Drug and Cosmetic Act*, page 246. The administrator construed the Act to permit a substandard article to be labeled as an 'imitation' at least as late as 1941 and took no different view until 1945, Kleinfeld & Dunn, *Federal Food, Drug and Cosmetic Act* 1938-1949, page 627, 712. Until this action was brought the label on products of the claimant was never questioned by the Administrator; in fact it is the label suggested by him. He does not question its sufficiency now. It was designed to meet the requirements of 343 (c) [Section 403 (c)] by showing that the product did not meet the standards but was an imitation. No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public the fact that the labeled food was not a standard product. It is a word of common usage and understanding. Webster defines it to mean: 'the form of something regarded as a pattern or model * * * an artificial likeness * * * simulating something superior esp. something more costly.' Necessarily any imitation would have the appearance of that which it imitates. In this case the jam did look and taste like that which meets the prescribed standard but it is labeled 'imitation' in the manner required by the statute. If the section is not given this construction it is meaningless." 183 F. 2d 1014, 1019, 1020. (R. 65-66)

VI

THE "IMITATION JAM" SEIZED IN THIS ACTION WAS NOT MISBRANDED "WHEN INTRODUCED INTO OR WHILE IN INTERSTATE COMMERCE OR WHILE HELD FOR SALE (WHETHER OR NOT THE FIRST SALE) AFTER SHIPMENT IN

INTERSTATE COMMERCE" AND IS NOT SUBJECT TO SEIZURE UNDER SECTION 304 (a) OF THE ACT.

The grounds for seizure of adulterated and misbranded food under the *Federal Food, Drug and Cosmetic Act* are contained in Section 304 (a) which provides in part as follows:

> "Any article of food, * * * that is * * * misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found, * * *."

The libel of information filed by the Government alleged that the food in question was "misbranded when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce." (R. 4). The petitioner in its answer denied this allegation (R-13). The basis for the Government contention that the "imitation jam" is misbranded is Section 403 (g) which provides as follows:

> "A food shall be deemed misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring and coloring) present in such food."

As petitioner has heretofore stated, this contention of the Government was shattered by the Trial Court when it made its finding of fact that "the articles of food seized

purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else (Finding of Fact 16, R. 23).

The evidence offered by the Government at the trial of the case consisted of offers of proof that the "imitation jam" was *served* to a patron of a New Mexico restaurant when the menu read "Jellies or Preserves served with above orders" (R. 41-42), that some consumers were *furnished* "imitation jam" by grocers when receiving telephone orders for jam (R. 43), and that at some logging camps and ranches "imitation jam and jellies" had been *served* to employees, and that such employees ate and consumed such products without being informed that the same were "imitation" products and without an opportunity to see or observe the label of the container (R. 43).

This was the extent of the evidence offered by the Government. The record does not disclose one shred of evidence that the "imitation" jam was actually sold as the standardized jam. No evidence was introduced to show that the jam under seizure was sold to wholesalers as "jam." There is no evidence, such as was introduced in *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S. D. Iowa, Central Division) that the food produced was invoiced in interstate commerce to the wholesaler as "jam." As the Trial Court found, there was no deception in the shipment in interstate commerce and the marketing of the product. Therefore, the seizure in the instant case cannot be sustained on the grounds that the food was misbranded "when introduced into or while in interstate commerce."

The only remaining ground to sustain the seizure herein contemplated is that the food was misbranded "while held for sale (whether or not the first sale) after shipment in interstate commerce." In the preceding paragraph petitioner maintained there was no representation that the imitation jam was in fact the standardized "jam." Similarly, since to the wholesaler the imitation jam was not represented to be nor did it purport to be standard-

ized jam, the next marketing relationship to scrutinize is the wholesaler-retailer relationship. Here also there is a total lack of evidence to indicate that the "imitation jam" "while held for sale" was represented to the retailer as standardized jam. There are no invoices showing billing to the retailer as "jam," there are no "sales dodgers" nor similar advertising material representing the product as jam.

Similarly there is no evidence that in the sale to the consuming public, the "imitation jam" was advertised as "Delicious Grape Jam," or that the retailer in invoicing the product to the logging camps and ranches invoiced the seized food as standardized jam.

Beginning with the shipment of the manufacturer in interstate commerce to the wholesaler, in the sale by the wholesaler to the retailer, and in the sale by the retailer to the ultimate purchaser, there is no evidence introduced by the Government that the "imitation jam" was misbranded "when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce." The Government having failed to introduce such evidence as required by Section 304 (a), the seizure attempted by the Government must be dismissed.

In this connection, the Court's attention is called to the fact that the trial court requested the Government and the Petitioner to file their requested Findings of Fact and Conclusions of Law. The Government's requested Findings of Fact and Conclusions of Law are set forth at pages 18 to 20 of the Record. The Government failed completely even to request a finding of the trial court that the food seized was misbranded. "When introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce" as required by Section 304 (a), and the Government having further failed to introduce any evidence to sustain such a finding by the trial court, this seizure action cannot be maintained.

VII

THE FOOD AND DRUG ADMINISTRATION HAS BEEN AND IS STILL UNABLE TO CHART A CONSISTENT COURSE OF ACTION AS TO THE IDENTITY OF FOOD PRODUCTS.

The petitioner has shown that up until April 14, 1945 and the issuance of the Administrator's Trade Correspondence No. 427, Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 746, the continuing policy of the Food and Drug Administration has been to sanction in interstate commerce substandard food if such substandard food was labeled "imitation" in conformity with Section 403 (c). The Government has laid great stress on the fact that since April 14, 1945, the Food and Drug Administration has reversed its former position and prohibited the shipment and marketing in interstate commerce of "imitation" food once a definition and standard of identity for the food so imitated has been established.

The Government contends that the word "imitation" on the label of the food product, and a list of the contents of the food (informative labeling) is not sufficient safeguard for the American people. The Food and Drug Administrator has refused to accept "imitation jam" as having a separate and distinct identity of its own established by Congressional Act under Section 403 (c), and when pectin replaces fruit in the standard food product, the Administrator proceeds against the food even though it is "imitation jam" labeled and marketed as such.

Petitioner contends that the action of the Government in proceeding against "imitation jam" in this action and by refusing to recognize the peculiar identity of this food product is adopting a policy inconsistent with its policy toward several other food products. Enumeration of several of these products will suffice on this point.

The Food and Drug Administrator has established a definition and standard of identity for "Cream Cheese," 21 *Code of Federal Regulations*, Section 19.515, CCH

Food, Drug and Cosmetic Law Reporter, Section 2362. Likewise a definition and standard of identity has been established for "neufchatel cheese," 21 *Code of Federal Regulations*, 19.520, CCH *Food, Drug and Cosmetic Law Reporter*, Section 2363. Neufchatel cheese differs from cream cheese only in that neufchatel cheese contains less milk fat and more moisture, not less than 20 per cent milk fat as against a requirement of at least 33 per cent for cream cheese.

Neufchatel cheese is therefore what the Government refers to as an economic adulteration; a less costly ingredient, water, is substituted for a portion of the milk fat used in cream cheese. In imitation jam, pectin solution is substituted for fruit. Up to this point the analogy between neufchatel cheese and imitation jam is similar. But the action by the Government against the two foods is radically different. The Administrator has dignified neufchatel cheese by recognizing its distinct identity and by establishing a definition and standard of identity for the product. Meanwhile the Administrator proceeds against "imitation jam" as a misbranded food.

Except to the food specialist completely familiar with cheese products, the physical appearance, taste, odor, etc., of cream cheese and neufchatel cheese are indistinguishable. If the patron of that certain New Mexico restaurant were to order "cream cheese," what protection would he have that he was not being served neufchatel cheese? Similarly, what is to prevent the service of neufchatel cheese in lieu of cream cheese to the employees of logging camps and ranches in New Mexico? To the petitioner, the situation is identical with reference to "imitation" jam and yet the Government attempts to seize "imitation jam" and yet dignifies substandard cream cheese with an identity of its own, neufchatel cheese.

Which course of action by the Government will result in greater protection to the consuming public? Most certainly the word "imitation" whether applied to cream cheese or jam would be a much greater safeguard and assurance that the product would be honestly marketed and

the public safeguarded than a word "nonfat-dried" which would neither connote inferiority, substitution, nor economic adulteration to the buying public. If protection of the public was the end result desired, the Administrator would have done well to sanction the product as "imitation cream cheese."

Similarly, standards of identity have been established for "sweet chocolate and vegetable fat (other than cocoa fat) coating, 21 *Code of Federal Regulations*, 14.11, CCH *Food, Drug, Cosmetic Law Reporter*, Section 2388, and sweet cocoa and vegetable fat (other than cocoa fat) coating, 21 *Code of Federal Regulations* 14.12, CCH *Food, Drug, Cosmetic Law Reporter*, Section 2389.

These food products differ from all other cocoa coatings in that foreign cheaper fats are allowed to be substituted for more expensive cocoa fats. The cheaper substitute product is similar in appearance, taste, odor, etc., to the more expensive product and is indistinguishable to the ordinary purchasing public, and yet the Food and Drug Administrator dignifies the substandard products with definitions and standards of identity of their own. Why then has the Government sifted "imitation jam" out for special vengeance?

A third substitute or substandard food product that is recognized as having an identity of its own is oleomargarine. Oleomargerine as a substitute for natural butter has been recognized as having an identity of its own by the Circuit Court of Appeals for the Eighth Circuit in *Land O'Lakes Creameries, Inc. v. Paul V. McNutt, Federal Security Administration, et al.*, 132 F. 2d 653 (C.A.8). The similarity between oleomargarine and butter are too well known to bear repetition here. Suffice is it to say that if it were not for the elaborate safeguards placed around oleomargerine by the butter industry, oleomargerine could have been easily marketed as "imitation butter."

The above examples point up the inconsistency of the Food and Drug Administration in dealing with the question of substandard food products. There is no sincerity in

the instant case why there is a compelling need to safeguard the public by the seizure of "imitation jars," while on the other hand the Government establishes definitions and standards of identity for substandard cream cheese, cocoa coating, and butter.

The compelling need to safeguard the public in the sale of substandard, but wholesome and nutritious food product is completely accomplished by the use of "imitation" labeling as contemplated by the Congress under Section 403 (e).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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